

## Internet Journalists and the Reporter's Privilege: Providing Protection for Online Periodicals\*

### I. INTRODUCTION

The reporter's privilege has become a national issue after the emergence of several controversial leaks to journalists of sensitive information, such as the name of CIA operative Valerie Plame<sup>1</sup> and grand jury documents of the BALCO steroids investigation in San Francisco.<sup>2</sup> Accordingly, the White House, Congress, and the public have become interested in the reporter's privilege—the concept that journalists should not be compelled to reveal their confidential sources in a civil or criminal matter. This privilege is similar to other professional privileges such as the attorney-client and doctor-patient privileges. Generally, it allows a journalist to withhold a source's identity and other information relating to that source, such as notes from a conversation, audio tapes of an interview, or video recordings. Journalists usually invoke the privilege in response to a subpoena demanding that they testify to a grand jury or in a civil proceeding. In the Valerie Plame incident, for example, a grand jury subpoenaed Judith Miller and Matthew Cooper for information about their conversations with confidential sources regarding Valerie Plame.<sup>3</sup> Both journalists claimed a testimonial privilege.<sup>4</sup> Despite a federal district court and the United

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1. E.g., CNN.com, *CIA Leak Investigation*, <http://www.cnn.com/interactive/law/0507/timeline.plame.case/frameset.exclude.html> (last visited February 10, 2008) (presenting a timeline of events related to the Valerie Plame leak investigation).

2. Bob Egelko, *Judge Rules Chronicle Reporters Must Name Their BALCO Sources*, S.F. CHRON., Aug. 16, 2006, <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/08/16/MNGE2KJE041.DTL>.

3. Andrew Cohen, *Punishing Good Journalists*, CBS NEWS, Feb. 16, 2005, <http://cbsnews.com/stories/2005/02/16/opinion/courtwatch/main674492.shtml>.

4. *Id.*

States Court of Appeals for the District of Columbia denying the reporter's privilege in that case, the journalists refused to reveal their sources.<sup>5</sup>

The issues surrounding the reporter's privilege are not new. For years now, cases involving the reporter's privilege have played out under the watchful eye of the national media. Ever since the Supreme Court decided *Branzburg v. Hayes*<sup>6</sup> in 1972, Congress, state legislatures, and federal and state courts have struggled with how to handle the reporter's privilege, which may be deemed a "shield law." They have struggled with balancing two distinct and competing interests: the protection claimed by traditional journalists under the First Amendment's provision for freedom of the press and the preservation of the judiciary and litigants to gain access to evidence in court proceedings.

Reporter's privilege advocates continue to seek enactment of shield laws from Congress and state legislatures. However, a common impediment to reporter's privilege legislation is uncertainty about the definition of a "journalist." On one side of the issue, the definition of a journalist can be narrowed to include only individuals working for traditional news sources.<sup>7</sup> In contrast, a journalist can also be defined too broadly. In that extreme, the category of "journalists" can be loosely defined to include all types of communications in a variety of media that disseminate information, gossip, opinion, and speculation—communications that are not news in the traditional sense.

The Bush administration opposed a shield law because of the difficulty of defining the term "journalist."<sup>8</sup> To protect national security and ensure that classified information was not leaked, the administration threatened a veto of any shield law enacted by Congress.<sup>9</sup> The U.S. Attorney General, Michael Mukasey, even emphasized during his confirmation hearings that the White House's major sticking point with any proposed reporter's privilege legislation was the broad definition of a journalist.<sup>10</sup> He stressed that the administration was concerned that the

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5. *Id.*

6. 408 U.S. 665 (1972).

7. Traditional news sources can be defined as print and broadcast media companies. Often these media outlets are called "Big Media," characterized by "large, arrogant institutions" which treat "the news as a lecture" and tell their audiences what the news is. DAN GILLMOR, *WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE*, at xiii (2004).

8. Pete Yost, *Bush Officials Oppose Media Shield Bill*, USA TODAY, Apr. 3, 2008, [http://www.usatoday.com/news/washington/2008-04-03-800740821\\_x.htm](http://www.usatoday.com/news/washington/2008-04-03-800740821_x.htm).

9. Laurie Kellman, *AG Nominee Reticent on Waterboarding*, ABC NEWS, Oct. 18, 2007, <http://abcnews.go.com/Politics/wireStory?id=3746673>.

10. *Id.*

proposed definitions “might inadvertently protect . . . bloggers who are also spies or terrorists.”<sup>11</sup>

As a result of fears of granting a privilege to amateur journalists on the Internet, little has been done to extend protection beyond traditional journalists. Defenders of the reporter's privilege, however, have achieved some success in gaining protection for Internet publishers who do not fall within the notion of the traditional press. In 2006, the California Court of Appeal decided *O'Grady v. Superior Court*,<sup>12</sup> a landmark ruling in reporter's privilege litigation. In this case, Apple Computers, Inc. sued two Internet publications for publishing confidential information about a soon-to-be-released Apple product on their respective websites.<sup>13</sup> The court extended reporter's privilege protection to these publications by categorizing the two websites as “periodicals” under the California constitution.<sup>14</sup> Although it is still too early to judge the ultimate value of this precedent, it opens the door for extending the legal protection enjoyed by traditional journalists to those who communicate to the public via the Internet.

This Comment relies on the assumption that the reporter's privilege is essential to the proper functioning of a democracy.<sup>15</sup> The privilege is rooted in the Constitution of the United States,<sup>16</sup> and throughout American history it has helped our democracy grow and thrive.<sup>17</sup> Some of the most fundamental qualities of the press—its independence from government control,<sup>18</sup> its service as a government “watchdog,”<sup>19</sup> and its ability to publicize stories from confidential sources<sup>20</sup>—have served vital roles in the development of our democracy.

This Comment argues that Internet journalists should be protected by the reporter's privilege if they are writing for an online “periodical” as interpreted by *O'Grady*. This interpretation adequately protects the interests of all journalists, including those who write for Internet publications, while preventing reporter's privilege protection from being extended to protect every person who posts online. *O'Grady's* interpretation of an online “periodical” assumes four crucial factors that

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11. *Id.*

12. 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006).

13. *Id.* at 76.

14. *Id.* at 106.

15. See *infra* Part III.A (discussing the need for the reporter's privilege).

16. See *infra* Part III.A.1 (discussing the historical roots of the reporter's privilege).

17. See *infra* Part III.A.2 (discussing the benefits of the reporter's privilege).

18. See *infra* Part III.A.2.c (discussing the press's independence from the government).

19. See *infra* Part III.A.2.a (discussing the press's role as a government watchdog).

20. See *infra* Part III.A.2.b (discussing the press's utilization of confidential sources).

warrant consideration: the frequency of publication, the number of articles published per week, the presence of a permanent web address, and the number of visitors per month to the website.<sup>21</sup>

This Comment further argues that federal courts, state courts, and legislatures should establish a two-prong test to achieve a practical application of the *O'Grady* interpretation. The first prong analyzes the Internet publication using the four factors taken from *O'Grady*. If an Internet publication strongly satisfies a minimum of three of these factors, then it should be considered an Internet "periodical" that is eligible for reporter's privilege protection. If the publication satisfies only one of the factors taken from *O'Grady*, or none at all, then the publication would not be eligible for the reporter's privilege protection. If the publication merely satisfies two factors in the first prong of the test, then the second prong becomes relevant and allows for a supplementary analysis of the Internet publication using two additional factors: a publication's reputation as an established news source and a publication's possession of its own URL. Under this second prong, if a publication satisfies two of the factors from *O'Grady* and both additional factors, then the publication should be considered an Internet "periodical" that is eligible for reporter's privilege protection.

## II. BACKGROUND

The first part of this section examines the reporter's privilege as it exists for journalists in traditional media. First, it analyzes the constitutional foundation for the reporter's privilege in the United States. Next, it gives an overview of the current status of reporter's privilege protection, starting with the Supreme Court precedent in *Branzburg v. Hayes*<sup>22</sup> and continuing with an assessment of the developments following that decision. Finally, it illuminates legislative concerns regarding shield law proposals by analyzing the common law status of the reporter's privilege in Kansas, the difficulties the Kansas Legislature experienced in previous attempts to pass reporter's privilege legislation, and the important components of proposed reporter's privilege legislation.

The latter part of this section analyzes Internet media and the issues it has raised with respect to the reporter's privilege. Initially, it details the spectrum of Internet publications that currently exist. After laying

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21. See generally *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 99–105 (Cal. Ct. App. 2006).

22. 408 U.S. 665 (1972).

this foundation, it continues with a discussion of *O'Grady* from the California Court of Appeal, a case which marks the first decision holding that a journalist who publishes solely on the Internet may receive the reporter's privilege protection that is typically reserved for traditional journalists.<sup>23</sup>

#### A. *The Foundation for the Reporter's Privilege*

The concept of the reporter's privilege is rooted in the First Amendment of the Constitution of the United States. By ensuring that "Congress shall make no law . . . abridging the freedom . . . of the press,"<sup>24</sup> the founders granted the press a right of independence from the government. The reporter's privilege has been a critical means by which journalists maintain their independence from the government—protecting journalists from being forced to function as agents of government officials and as servants of those in power.

#### B. *The Status of the Reporter's Privilege*

The United States Supreme Court addressed the reporter's privilege in *Branzburg*.<sup>25</sup> Since that time, however, the Court has refused to revisit its holding—one that is often considered unclear and confusing.<sup>26</sup> As a result, federal and state courts have been left to sort out its meaning and significance. Additionally, Congress and state legislatures have reacted to this precedent by considering shield law legislation, with a majority of U.S. jurisdictions enacting such laws.<sup>27</sup>

##### 1. *The Branzburg v. Hayes Precedent*

The leading case on the reporter's privilege is *Branzburg*.<sup>28</sup> This 1972 Supreme Court case was decided by a 5-4 vote for the specific facts of the case.<sup>29</sup> However, only a plurality of the Justices voted in favor of the sweeping assertion that the First Amendment does not provide a

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23. *O'Grady*, 44 Cal. Rptr. 3d at 77.

24. U.S. CONST., amend. I.

25. 408 U.S. 665 (1972).

26. Pennsylvania Newspaper Association, *Subpoenas Newspaper Handbook*, [http://www.penn-newspaper.org/web/2005/10/subpoenas\\_newspaper\\_handbook.aspx](http://www.penn-newspaper.org/web/2005/10/subpoenas_newspaper_handbook.aspx) (last visited Sept. 20, 2008).

27. See *infra* Part II.B.2 and note 56.

28. 408 U.S. 665 (1972).

29. *Id.* at 665, 709.

journalist with protection from revealing sources of information during a judicial proceeding.<sup>30</sup>

The case involved three journalists—Branzburg, Pappas, and Caldwell.<sup>31</sup> Branzburg was a Kentucky journalist who wrote two stories that were the subject of a grand jury investigation.<sup>32</sup> The stories, written in November 1969<sup>33</sup> and January 1971,<sup>34</sup> both dealt with the drug business.<sup>35</sup> Pappas, a Massachusetts journalist, observed activities of the Black Panther Party that were later part of a grand jury investigation.<sup>36</sup> The events occurred on July 30, 1970, but Pappas did not write about what he observed.<sup>37</sup> The last journalist, Caldwell, covered the Black Panther Party in New York and was later subject to a grand jury investigation in the Northern District of California.<sup>38</sup> One of the many stories he wrote about the Black Panther Party was published in December 1969.<sup>39</sup> A grand jury sought extensive information regarding his stories and his conversations with the Black Panther Party from which those stories were based.<sup>40</sup>

The question in the case was “whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment.”<sup>41</sup> The Supreme Court held that “the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.”<sup>42</sup> The Court essentially asserted that “the government’s interest in fighting crime outweighed . . . [that] burden.”<sup>43</sup>

The concurrence by Justice Powell left the door open for freedom of the press advocates by supporting a “qualified reporter’s privilege.”

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30. *Id.* at 667.

31. *Id.* at 667, 672, 675.

32. *Id.* at 667–71.

33. *Id.* at 667.

34. *Id.* at 669.

35. *Id.* at 667–71.

36. *Id.* at 672–74.

37. *Id.* at 672.

38. *Id.* at 675–79.

39. *Id.* at 677.

40. *Id.* at 675–76.

41. *Id.* at 667.

42. *Id.* at 682.

43. Leita Walker, Comment, *Saving the Shield with Silkwood: A Compromise to Protect Journalists, Their Sources, and the Public*, 53 U. KAN. L. REV. 1215, 1221–22 (2005) (quoting Anthony Fargo, *Evidence Mixed on Erosion of Journalists’ Privilege*, NEWSPAPER RES. J., Spring 2003, at 51).

Although Powell joined the Court's decision for the specific facts of the case, he emphasized that the Court did not hold that "newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safe-guarding their sources."<sup>44</sup> He went on to explain his view that the "asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."<sup>45</sup> This balance of competing interests has been touted by freedom of the press advocates as the "qualified reporter's privilege."<sup>46</sup>

The two dissenting opinions in *Branzburg* supported a reporter's privilege.<sup>47</sup> Justice Douglas argued for an absolute reporter's privilege in his dissent.<sup>48</sup> Justice Stewart, joined by Justices Brennan and Marshall, supported a qualified reporter's privilege.<sup>49</sup> These Justices identified a three-part test that the government should satisfy to overcome the reporter's privilege. The test required the government to:

- (1) [S]how that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.<sup>50</sup>

## 2. Developments After the *Branzburg* Decision

The Supreme Court has not revisited the issues raised in the *Branzburg* decision. It also has not attempted to clarify "the existence or parameters of the constitutional privilege" granted to journalists.<sup>51</sup> Still, advocates for the reporter's privilege have used Powell's concurring opinion and Stewart's dissent in their attempts to convince courts and legislatures to adopt at least a qualified reporter's privilege.<sup>52</sup> "Most

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44. *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

45. *Id.* at 710.

46. E.g., Lee L. Cameron, Jr. et al., *Constitutional Law—In Re Grand Jury Matter*, Gronowicz: *Qualified Newsperson's Privilege Does Not Extend to Authors*, 61 NOTRE DAME L. REV. 245, 250 (1986).

47. *Branzburg*, 408 U.S. at 712 (Douglas, J., dissenting); *id.* at 736 (Stewart, J., dissenting).

48. *Id.* at 712 (Douglas, J., dissenting).

49. *Id.* at 725, 743 (Stewart, J., dissenting).

50. *Id.* at 743.

51. Len Niehoff, *The Constitutional Privilege after Branzburg: An Historical Overview*, in WHITE PAPER ON REPORTER'S PRIVILEGE 61, 63 (2004).

52. Walker, *supra* note 43, 1222.

courts had little difficulty reading *Branzburg* to support the existence of a constitutional privilege” for reporters.<sup>53</sup> Consequently, federal and state courts developed a consensus in favor of a balancing test based on Powell and Stewart’s opinions.<sup>54</sup> The test contains “three factors: (1) the relevance of the information sought; (2) whether the information is necessary or critical to a party’s claim or defense—i.e., whether the information goes to the heart of the case; and (3) whether the party requesting the information has exhausted alternative sources.”<sup>55</sup>

Although Congress has thus far resisted reporter’s privilege legislation, thirty-two states and the District of Columbia have adopted statutory protection of one kind or another for journalists involved in judicial proceedings.<sup>56</sup> Only three of the remaining eighteen states do not recognize a common law reporter’s privilege.<sup>57</sup>

### C. *The Reporter’s Privilege in Kansas*

The reporter’s privilege in Kansas is governed by a narrow 1978 Kansas Supreme Court decision. This decision grants little protection to Kansas journalists. Although attempts to pass reporter’s privilege legislation have been futile thus far, Kansas has recently contemplated legislation that would provide for qualified reporter’s privilege protection.

53. Niehoff, *supra* note 51, at 68.

54. *Id.* at 70.

55. *Id.* at 70–71.

56. The states that have codified a reporter’s privilege are Alabama (ALA. CODE § 12-21-142 (2006)), Alaska (ALASKA STAT. § 09.25.300 (2007)), Arizona (ARIZ. REV. STAT. ANN. § 12-2214 (2003)), Arkansas (ARK. CODE ANN. § 16-85-510 (West 2004)), California (CAL. CONST. art. I, § 2(b) (West 2002)), Colorado (COLO. REV. STAT. § 13-90-119 (West 2005)), Delaware (DEL. CODE ANN. tit. 10, § 4322 (2006)), Florida (FLA. STAT. § 90.5015(2) (West 1999)), Georgia (GA. CODE ANN. § 24-9-30 (West 2003)), Illinois (735 ILL. COMP. STAT. 5/8-901 to -909 (2008)), Indiana (IND. CODE § 34-46-4-2 (West 1999)), Kentucky (KY. REV. STAT. ANN. § 421.100 (West 2006)), Louisiana (LA. REV. STAT. ANN. § 45:1452 (1999)), Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2002)), Michigan (MICH. COMP. LAWS § 767.5A (West 2000)), Minnesota (MINN. STAT. §§ 595.023–.025 (West 2000)), Montana (MONT. CODE ANN. § 26-1-902 (2005)), Nebraska (NEB. REV. STAT. §§ 20-144 to -46 (1997)), Nevada (2004 NEV. REV. STAT. ANN. 49.275), New Jersey (N.J. STAT. ANN. § 2A:84A-21.9 (West 1994)), New Mexico (N.M. STAT. §§ 38-6 to -7 (West 2003)), New York (N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992)), North Carolina (N.C. GEN. STAT. § 8-53.11 (West 2000)), North Dakota (N.D. CENT. CODE § 31-01-06.2 (2008)), Ohio (OHIO REV. CODE ANN. § 2739.04 (West 2006)), Oklahoma (OKLA. STAT. tit. 12, § 2506 (1993)), Oregon (OR. REV. STAT. § 44.520 (West 2003)), Pennsylvania (42 PA. CONS. STAT. ANN. § 5942 (West 2000)), Rhode Island (R.I. GEN. LAWS § 9-19.1-2 (2006)), South Carolina (S.C. CODE ANN. § 19-11-100 (Supp. 2007)), Tennessee (TENN. CODE ANN. § 24-1-208 (West 2002)), and Washington (WASH. REV. CODE ANN. § 5.68.010 (Supp. 2008)). The District of Columbia has also codified a reporter’s privilege (D.C. CODE §§ 16-4701 to -04 (2001)).

57. Walker, *supra* note 43, at 1223.



### 1. The *State v. Sandstrom* Precedent

The leading Kansas case dealing with the reporter's privilege is *State v. Sandstrom*, a 1978 Kansas Supreme Court decision.<sup>58</sup> In its decision, the Court generally supported a narrow form of the reporter's privilege in Kansas.<sup>59</sup> However, it agreed with the trial court's refusal to recognize a reporter's privilege in the context of the case.<sup>60</sup>

The case involved Joe Pennington, a Topeka journalist, who spoke with a confidential news source while investigating a possible story about the May 1977 murder of Thad Sandstrom.<sup>61</sup> The source disclosed that one of the State's witnesses for the murder trial of Sandstrom had threatened to kill Sandstrom at a party shortly before his death.<sup>62</sup> The source had learned this information from another person who had heard it.<sup>63</sup> Pennington refused to reveal the name of the source and was sentenced to sixty days in jail.<sup>64</sup>

The Supreme Court, in its holding, stated that "[w]e believe a newsperson has a limited privilege of confidentiality of information and identity of news sources, although such does not exist by statute or common law."<sup>65</sup> Still, the Court decided it should not "disturb the ruling of the trial court [to jail Pennington for refusing to reveal his source] unless the record clearly show[ed] the information sought [was] not relevant to the defense or could not lead the defendant to information relevant to her defense."<sup>66</sup>

### 2. Developments in the Kansas Legislature

Due to the *Sandstrom* precedent, Kansas has a very limited reporter's privilege protection at common law. Members of the Kansas Legislature and freedom of the press advocates have reacted by pushing for statutory protection for journalists.

Previous attempts to pass reporter's privilege legislation in Kansas have been unsuccessful.<sup>67</sup> One recent attempt was in 2002–2003.<sup>68</sup> At

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58. *State v. Sandstrom*, 581 P.2d 812 (Kan. 1978).

59. *Id.* at 814–16.

60. *Id.* at 816.

61. *Id.* at 814.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 816.

67. See, e.g., Walker, *supra* note 43, at 1217.

that time, “a legislative advisory committee unanimously rejected the bill.”<sup>69</sup> That proposal allowed for “an absolute privilege to journalists to refuse to disclose any confidential source or information” and a “qualified privilege to them not to disclose any nonconfidential source or information.”<sup>70</sup> But it failed to “satisfactorily define who would qualify for [reporter’s privilege] protections”—a problem that posed major difficulties for the bill and led to its ultimate rejection by the legislative advisory committee.<sup>71</sup>

Senate Bill 313, which was introduced during the 2008 legislative session, proposed granting qualified protection to journalists.<sup>72</sup> The bill stated that a “journalist cannot be adjudged in contempt by a judicial, legislative, administrative body or any other body having the power to issue subpoenas, for refusing to disclose, in any state or local proceeding, any information or the source of any such information procured while acting as a journalist.”<sup>73</sup>

The bill limited the protections, however, by defining a journalist as “a publisher, editor, reporter or other person employed by a newspaper, magazine, news wire service, television station or radio station who gathers, receives or processes information for communication to the public.”<sup>74</sup> The bill’s definitions of “information”<sup>75</sup> and “acting as a journalist,”<sup>76</sup> which are both crucial to the determination of exactly who receives the qualified protection, were similarly limited to the traditional idea of a journalist.

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68. *Id.* at 1217 n.19.

69. *Id.*

70. *Id.* at 1230.

71. *Id.* at 1233.

72. S.B. 313, 2007 Sess. (Kan. 2007). The Kansas Senate Judiciary Committee held a hearing on Senate Bill 313 on March 10, 2008. James Carlson, *Senate Panel Hears Debate on Confidential Sources Legislation*, TOPEKA CAPITAL-JOURNAL, Mar. 11, 2008, [http://www.cjonline.com/stories/031108/sta\\_255724361.shtml](http://www.cjonline.com/stories/031108/sta_255724361.shtml). The committee never held a vote on the bill and it died in committee at the end of May 2008. Kansas Legislature Bill Tracking, <http://www.kslegislature.org/legsrv-billtrack/searchBills.do> (last visited Oct. 21, 2008) (search of Senate Bill 313).

73. S.B. 313, § 2, 2007 Sess. (Kan. 2007).

74. *Id.* § 1(a).

75. The Bill defines information as follows:

[A]ny information gathered, received or processed by a journalist, whether or not such information has been disseminated, and includes, but is not limited to, all notes, outtakes, photographs, tapes and other recordings or other data of whatever sort that is gathered by a journalist in the process of gathering, receiving or processing information for communication to the public.

*Id.* § 1(b).

76. The Bill defines “acting as a journalist” as “a journalist who is engaged in activities that are a part of such journalist’s gathering, receiving or processing information for communication to the public.” *Id.* § 1(c).

The privilege in Senate Bill 313 is considered “qualified” because, under section three, parties may compel disclosure if they establish, by clear and convincing evidence that: (1) the disclosure sought “[i]s material and relevant to the controversy,” (2) the disclosure sought “cannot be obtained by alternative means,” and (3) the disclosure sought “is of a compelling and overriding interest for the party seeking the disclosure and is necessary to secure the interests of justice.”<sup>77</sup>

Sections four and five established the procedure by which a journalist will reveal his or her sources to the court if the party requesting information meets its burden. Disclosure first takes place by *in camera* inspection.<sup>78</sup> Following a hearing where the two parties may make arguments to the court, the “court shall determine whether the disclosure is likely to be admissible as evidence and whether its probative value is likely to outweigh any harm done to the free dissemination of information to the public through the activities of journalists.”<sup>79</sup> If the court determines there is no reasonable basis for disclosure, “costs and attorney fees may be assessed against the party seeking disclosure.”<sup>80</sup>

### 3. Federal Protection in Kansas

*Silkwood v. Kerr-McGee Corp.*,<sup>81</sup> a Tenth Circuit case decided in 1977, is the present reporter’s privilege law for federal cases in Kansas. *Silkwood* held that courts must consider four criteria to determine whether a journalist may resist compulsory disclosure: (1) “[w]hether the party seeking information has independently attempted to obtain the information elsewhere and has been unsuccessful,” (2) “[w]hether the information goes to the heart of the matter,” (3) “[w]hether the information is of certain relevance,” and (4) “[t]he type of controversy.”<sup>82</sup>

This standard was incorporated into the most recent Kansas legislation. Therefore, if legislation similar to Senate Bill 313 is enacted, Kansas will likely have the same reporter’s privilege standard in both the federal and state court systems.

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77. *Id.* § 3(a)–(c).

78. *Id.* § 4.

79. *Id.*

80. *Id.* § 5.

81. 563 F.2d 433 (1977).

82. *Id.* at 438.

*D. The Spectrum of Internet Publications*

The Internet poses a difficult problem in deciding who should qualify as a journalist. Many different kinds of publishers use it to disseminate diverse kinds of content that may not always include news. These Internet publications range across a broad spectrum. On one end are websites affiliated with a recognized news service or news publication.<sup>83</sup> These websites can exist for news broadcasters and publications that are national,<sup>84</sup> statewide,<sup>85</sup> and local.<sup>86</sup> The websites display content that appeared in a print publication or was in a broadcast news program. Such websites qualify for reporter's privilege protection. Also, Internet publications that are affiliated with a traditional news medium and provide additional commentary and information may also lay a strong claim to the reporter's privilege.<sup>87</sup>

On the other end of the spectrum are personal blogs or diaries written by individuals who either post on their own websites or utilize a free online blogging service (such as those provided through Xanga,<sup>88</sup> LiveJournal,<sup>89</sup> Blogger,<sup>90</sup> or even MySpace<sup>91</sup>). Such Internet publishers, because of the *personal* nature of their work, have little or no argument for the reporter's privilege.

Once the extremes of the spectrum are established, though, the difficulty is deciding whether or how to protect publishers at or near the middle of the spectrum. These Internet publishers are not affiliated with a print or broadcast news service and may or may not disseminate personal information. However, they do contain something that may

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83. See, e.g., CNN.com, <http://www.cnn.com> (last visited Oct. 21, 2008) (providing access to the stories that are broadcast on CNN's twenty-four hour news reports); The New York Times, <http://www.nytimes.com> (last visited Oct. 21, 2008) (providing access to the articles that are published in the New York Times); USA Today, <http://www.usatoday.com> (last visited Oct. 21, 2008) (providing access to the articles that are published in USA Today).

84. *Id.*

85. See, e.g., Kansas.com, The Wichita Eagle, <http://www.kansas.com> (last visited Oct. 21, 2008) (containing articles that appeared in the print version of the Wichita Eagle); The Topeka Capital-Journal Online, <http://www.cjonline.com> (last visited Oct. 21, 2008) (containing articles that appeared in the print version of the Topeka Capital-Journal).

86. See, e.g., The Iola Register, <http://www.iolaregister.com> (last visited Oct. 21, 2008) (displaying the major articles from the author's hometown newspaper, the Iola Register).

87. See, e.g., Stephanie J. Frazee, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 8 VAND. J. ENT. & TECH. L. & PRAC. 609, 627 (2006) (stating that even a traditional journalist can be analogized to someone like Joel Achenbach, who writes an online blog for the Washington Post).

88. Xanga, <http://www.xanga.com> (last visited Oct. 21, 2008).

89. LiveJournal, <http://www.livejournal.com> (last visited Oct. 21, 2008).

90. Blogger, <http://www.blogger.com/start> (last visited Oct. 21, 2008).

91. MySpace, <http://www.myspace.com> (last visited Oct. 21, 2008).

amount to journalistic work. Some of these publications take the form of what has come to be known as "e-zines." An "e-zine" is defined as:

[A] magazine published in electronic form on a computer network, esp[ecially] the Internet. Although most strongly associated with special-interest fanzines only available online, *e-zine* has been widely applied: to regularly updated general-interest websites, to electronic counterparts of print titles (general and specialist), and to subscription-only e-mail newsletters.<sup>92</sup>

Other Internet publications in the middle of the spectrum take the form of blogs that may or may not be affiliated with an online blogging service. A blog is defined as "a website that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer."<sup>93</sup>

Although Internet publications share common traits, distinguishing among them is possible. The distinctions can be used to address the fears that many politicians have about granting protection to an extremely large class of individuals who post information on the Internet. In fact, distinctions among Internet publications formed the foundation for the decision in *O'Grady*.<sup>94</sup>

#### *E. O'Grady and the Reporter's Privilege for Internet Journalists*

*O'Grady v. Superior Court* was decided by the California Court of Appeal in May 2006.<sup>95</sup> The case was based on a writ of mandate to compel the Superior Court of Santa Clara to set aside its denial of a motion for protective order in *Apple Computer v. Doe I*.<sup>96</sup>

*O'Grady* involved two Internet-only publications—O'Grady's PowerPage<sup>97</sup> and Apple Insider.<sup>98</sup> Both publications were sued by Apple Computer, Inc. for causing "the wrongful publication on the World Wide Web of Apple's secret plans to release a device that would facilitate the creation of digital live sound recordings on Apple computers."<sup>99</sup>

92. *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 100 (Cal. Ct. App. 2006) (quoting the OXFORD ENGLISH DICTIONARY, <http://dictionary.oed.com> (last visited Oct. 4, 2008)).

93. MERRIAM WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/blog> (last visited Sept. 26, 2008).

94. 44 Cal. Rptr. 3d at 99–105.

95. *Id.* at 72.

96. *Id.* at 82.

97. O'Grady's PowerPage.org, <http://www.powerpage.org/> (last visited Oct. 21, 2008).

98. Apple Insider, <http://www.appleinsider.com/> (last visited Oct. 21, 2008).

99. *O'Grady*, 44 Cal. Rptr. 3d at 76.

The two publications share many similar traits in regard to their respective purposes, track record for publishing, and web traffic. O'Grady's PowerPage is "an 'online news magazine' devoted to news and information about Apple Macintosh computers and compatible software and hardware."<sup>100</sup> It "has published daily since 1995" and "publishes 15 to 20 items per week."<sup>101</sup> The site has occupied its present web address since 2002 and "received an average of 300,000 unique visits per month" in the two years preceding the case.<sup>102</sup>

"Apple Insider is an 'online news magazine' devoted to Apple Macintosh computers and related products."<sup>103</sup> It has published "daily or near-daily technology news" since 1998 and publishes "at an average rate of seven to 15 articles per week."<sup>104</sup> The site has occupied its present web address since 1998 and "received 438,000 unique visitors" in July 2004.<sup>105</sup>

The lawsuit ensued after both websites published "several articles concerning a rumored new Apple product known as Asteroid or Q97."<sup>106</sup> "The first article appeared on [O'Grady's] PowerPage on November 19, 2004."<sup>107</sup> The articles included confidential information about the unreleased product, such as general descriptions of the product, drawings of the product, date of the product's introduction, its projected price, and opinions about the product.<sup>108</sup>

Apple filed suit against the two Internet publishers, initially calling them and their employees "Doe 1" and "Does 2-25."<sup>109</sup> It alleged that they misappropriated a trade secret when they posted technical details about the product on their websites.<sup>110</sup> In an attempt to find the proper defendants in the action, Apple filed two ex parte appeals.<sup>111</sup> The first appeal resulted in a court authorization "to serve subpoenas, whether through use of commissions or in-state process, on Powerpage.org, Appleinsider.com, and Thinksecret.com for documents" that would assist

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100. *Id.* at 77.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 77-79.

109. *Id.* at 80.

110. *Id.*

111. *Id.* at 80-81.

in identifying the defendants.<sup>112</sup> The second resulted in “subpoenas requiring Nfox.com and Karl Kraft[—host of the PowerPage e-mail account—]to produce ‘[a]ll documents relating to the identity of any person or entity who supplied information’” about Asteroid.<sup>113</sup> The Internet publishers responded with a motion for a protective order in which they asserted that their sources were protected under the California reporter’s shield of the California Constitution<sup>114</sup> and the California Evidence Code,<sup>115</sup> plus the federal reporter’s privilege under the First Amendment.<sup>116</sup> The lower court denied the protective order for the Nfox.com and Kraft subpoenas, holding that the reporter’s privilege did not apply to trade secrets.<sup>117</sup> However, the court did not reach the merits of any of the other discovery orders.

The California Court of Appeal for the Sixth District reviewed all of the subpoenas and upheld the reporter’s privilege with respect to each subpoena under California state law.<sup>118</sup> With respect to the subpoena for Nfox.com and Kraft’s records, the court ruled that the subpoenas could not be enforced “without compelling them to violate the [Stored Communications Act].”<sup>119</sup> With respect to the other subpoenas, the court upheld them by concluding that the activities of PowerPage and Apple Insider constituted “legitimate journalism”<sup>120</sup> and that the publishers were “covered persons”<sup>121</sup> and their articles were “covered publications.”<sup>122</sup>

Despite Apple’s claims that the publishers “merely reprinted ‘verbatim copies’ of Apple’s internal information while exercising ‘no editorial oversight at all,’” the court asserted that the “shield law is intended to protect the gathering and dissemination of *news*,” thereby encompassing O’Grady’s PowerPage and Apple Insider actions.<sup>123</sup> The court dismissed the “editorial oversight” argument because “an absence of editorial judgment cannot be inferred merely from the fact that some source material is published verbatim,” particularly in today’s digital

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112. *Id.* at 81.

113. *Id.*

114. CAL. CONST. art. I, § 2(b).

115. CAL. EVID. CODE § 1070 (West 1995).

116. *O’Grady*, 44 Cal. Rptr. 3d at 81.

117. *Apple Computer, Inc. v. Doe 1*, No. 1-04-CV-032178, 2005 WL 578641, at \*7–8 (Cal. Super. Ct. Mar. 11, 2005).

118. *See generally O’Grady*, 44 Cal. Rptr. 3d at 77.

119. *Id.* at 92.

120. *Id.* at 97–98.

121. *Id.* at 99.

122. *Id.* at 99–105.

123. *Id.* at 97.

age.<sup>124</sup> As the court pointed out, “[a] reporter who uncovers newsworthy documents cannot rationally be denied the protection of the law because the publication for which he works chooses to publish facsimiles of the documents rather than editorial summaries.”<sup>125</sup> Additionally, the court urged other courts not “to cling too fiercely to traditional preconceptions [about how information is printed], especially when they may operate to discourage the seemingly salutary practice of providing readers with source materials rather than subjecting them to the editors’ own ‘spin’ on a story.”<sup>126</sup>

The court ultimately concluded that the authors of the websites were indeed publishers.<sup>127</sup> It affirmed that “[n]ews-oriented [websites] like petitioners’ are surely ‘like’ a newspaper or magazine for these purposes.”<sup>128</sup> The court reached this decision by declaring that the websites fell within the California statute’s definition of “magazines and other periodical publications.”<sup>129</sup> In making its decision, the court analyzed the following factors: (1) the definition of “e-zines”;<sup>130</sup> (2) the inclusion of “other periodical publications” under the statute;<sup>131</sup> (3) the extent to which petitioners’ websites “are highly analogous to printed publications: they consist predominately of text on ‘pages’ which the reader ‘opens,’ reads at his own pace, and ‘closes,’”<sup>132</sup> (4) the potential distinction between websites and “blogs” (although the court avoided using the word blog because of its “rapidly evolving and currently amorphous meaning”);<sup>133</sup> and (5) the frequency of publication:

[I]ndividual articles are added as and when they become ready for publication, so that the home page at a given time may include links to articles posted over the preceding several days. This . . . is characteristic of online publications but is difficult to characterize as publication

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124. *Id.* at 97–98.

125. *Id.* at 97.

126. *Id.* at 98.

127. *Id.* at 99.

128. *Id.*

129. *Id.* at 104.

130. *See supra* note 92 and accompanying text.

131. *O’Grady*, 44 Cal. Rptr. 3d at 100–04.

132. *Id.* at 103.

133. *Id.* at 102 n.21. The Court cites Wikipedia’s discussion of webzines versus blogs: “[a] distinguishing characteristic [of webzines] from blogs is that webzines bypass the strict adherence to the reverse-chronological format; the front page is mostly clickable headlines and is laid out either manually on a periodic basis, or automatically based on the story type.” *Id.*



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at "regular intervals." . . . [However,] an online dictionary of library science . . . [refers] to such a [website] as a "periodical."<sup>134</sup>

After considering the presence of these factors for both of the Internet publications, the court concluded:

[T]he Legislature intended the phrase "periodical publication" [in the California constitutional provision] to include all ongoing, recurring news publications while excluding non-recurring publications . . . [and] that the statute protect[ed] publications like petitioners', which differ from traditional periodicals only in their tendency, which flows directly from the advanced technology they employ, to continuously update their content.<sup>135</sup>

As a result, both publications were deemed to be protected by the reporter's privilege under the California constitutional provision.<sup>136</sup>

In addition to its decision with respect to the California Constitution, the court also upheld the reporter's privilege under the First Amendment by adhering to the constitutional protections that are recognized by California to guarantee freedom of the press.<sup>137</sup> Although this recognition is also an important part of the *O'Grady* case, it is not as important to the present analysis because it is dependent upon an individual state's interpretation of a provision of the Constitution of the United States, rather than a promulgation of a definition that, while unique to the California Constitution, can be readily adopted by both legislatures and courts throughout the country.

### III. ANALYSIS

This section first advocates for the reporter's privilege by looking at both the historical components and the practical components of the argument. Next, it asserts that a reporter's privilege is not only necessary for traditional journalists but for Internet journalists as well. This section then discusses the difficulties that the reporter's privilege has faced in legislatures due to problems associated with defining the term "journalist." Ultimately, it argues that the solution to this problem is to adopt the definition of a "periodical" that emerges from the *O'Grady*

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134. *Id.* at 104. "[M]any familiar print publications universally viewed as 'periodicals' . . . do not appear with absolute regularity," such as the *New Yorker Magazine* and *New York Review of Books*. *Id.*

135. *Id.* at 104–05.

136. *Id.* at 105.

137. *Id.* at 105–15.

case because this definition respects the interests of the traditional journalist, the Internet journalist, and the public while alleviating the concerns of lawmakers, judges, and other political officials.

*A. The Need for a Reporter's Privilege*

The argument for the reporter's privilege has both a historical and a practical component. The historical angle focuses on why the reporter's privilege was considered an important concept in the first place while the practical angle seeks to put the reporter's privilege in perspective and highlight its benefits in contemporary America.

1. Historical Roots of the Reporter's Privilege

The need for the reporter's privilege is tied directly to the rights granted to the press in the United States Constitution. In the First Amendment, the founders ensured that "Congress shall make no law . . . abridging the freedom of the press."<sup>138</sup> This fundamental right was of supreme importance to the Founding Fathers. Thomas Jefferson is known to have said that, "if given the choice of newspapers or government, he'd take the newspapers."<sup>139</sup>

The "freedom of the press" clause grants rights to the press that cannot be infringed upon by the government. Therefore, the media's activities should not be subjected to the fear of government control. The reporter's privilege is the primary means by which reporters maintain this independence from the government. Without the reporter's privilege, journalists would know their activities would be subject to scrutiny and their sources would not be confidential if a court compelled disclosure. As a result, they would carry out their newsgathering activities in fear of the government and the judiciary. This would effectively limit the scope of journalistic activity, particularly if a journalist wanted to stay out of legal trouble and avoid fines and even imprisonment.

2. Benefits of the Reporter's Privilege

The press plays a vital role in maintaining a free flow of information and a healthy democracy. Some of its most practical benefits to

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138. U.S. CONST. amend. I.

139. GILLMOR, *supra* note 7, at 1.

American society include its service as a “watchdog” over federal, state, and local governments; its utilization of confidential sources to reveal problems that would not receive any public attention otherwise; and its independence from the government that allows for a more neutral, balanced analysis.

a. The Press as a Government “Watchdog”

The press can often be viewed as operating as a “watchdog” for the government at the federal, state, and local levels. Numerous stories concerning government malfeasance can be traced to anonymous government sources.<sup>140</sup> Without the information provided by these individuals, the public would lack knowledge on many important issues. In fact, “[i]n the years since Watergate, literally thousands of stories concerning government corruption, mismanagement, and the more mundane ‘inside workings’ of our public institutions—at the federal, state, and local levels—have resulted from information provided to reporters under promises of confidentiality.”<sup>141</sup> Although many of these stories may simply be routine, some were landmark events:

[A]rguably some of the “biggest” stories involving government corruption, deception or misinformation about official policy in each of the past four decades has resulted from information provided by anonymous sources or “leaks”: 1. Watergate; 2. The Pentagon Papers . . . ; 3. The Iran-Contra “arms-for-hostages” deal; [and] 4. Anita Hill’s allegation that Clarence Thomas had sexually harassed her.<sup>142</sup>

Without reporter’s privilege protection, it is unlikely that these stories would ever have seen the light of day or received the amount of attention that they did. Government employees put their careers on the line and sometimes even put their lives in jeopardy to share these stories.<sup>143</sup> If protection of their identity had not been guaranteed, they might not have been as willing to share information and expose government wrongdoing.

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140. See *infra* note 143 and accompanying text.

141. Steven D. Zansberg, *The Empirical Case: Proving the Need for the Privilege*, in MLRC White Paper on Reporter’s Privilege 147 (Aug. 2004).

142. *Id.* at 156.

143. See John Koblin, *A New Times Memo on Anonymous Sources*, N.Y. OBSERVER, <http://www.observer.com/2008/new-times-memo-anonymous-sources> (“We cannot bring readers the information they want and need to know without sometimes protecting sources who risk reprisals, firing, legal action or, in some parts of the world, their lives when they confide in us.”).

b. The Press's Utilization of Confidential Sources

The press has always valued the help of confidential sources to break stories in both the public and private sectors. This is because the press can better keep the public informed of matters of importance if anonymous sources feel confident that they can step forward to talk to the press while having their anonymity protected. The impact of these stories is far-reaching. For example, "promises of confidentiality to informed sources within companies and private industry are essential to the disclosure of information that may affect millions of investors and/or consumers."<sup>144</sup> When such stories are a direct result of whether those possessing the critical information feel sufficiently protected from retaliation to share what they know, it is essential to create a safe environment to encourage those persons to come forward. The best way to accomplish this is through the protection offered by the reporter's privilege.

c. The Press's Independence from the Government

The press's independence from the government is rooted in the First Amendment. This independence continues to be a very important issue in the debate about the press's rights because confidential sources need the confidence that they are sharing information with a journalist who is not merely an extension of the government. Without such independence, the likelihood that these sources will reveal information of great importance sharply declines. As one author pointed out:

Myriad news reports and other information of interest to the general public—not limited to any particular topic or field—depend upon the press' ability to obtain information from sources, not on a confidential basis, but with the understanding that the press is independent and "neutral," not an "arm of the government" or any other litigant.<sup>145</sup>

Without a reporter's privilege, the press's ability to promise protection to these confidential sources will be virtually nonexistent, leading to the public's failure to receive important information that may have been of significant benefit.

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144. Zansberg, *supra* note 141, at 164.

145. *Id.* at 166.

*B. The Need for the Reporter's Privilege for Internet Journalists*

Despite the animosity toward Internet journalists by lawmakers and government officials, protection should still be given to legitimate Internet journalists. It is not wise to “assume that self-publishing from the edges of our networks—the grassroots journalism we need so desperately—will survive, much less thrive. We . . . need to defend . . . [self-publishing], with the same vigor we defend other liberties.”<sup>146</sup>

Two important reasons support this argument. First, the Internet has been a fundamental part of many ground-breaking stories, particularly on the political front but also with respect to the private sector. Second, Internet publications have the capacity to reach a much larger audience than any other form of journalistic activity.

*1. The Role of Internet-Only Publications in Major News Stories*

Internet-only publications have played a crucial role in several major stories in the past few years.<sup>147</sup> These stories include the Monica Lewinsky story (as first exposed by Matt Drudge on the Drudge Report), Trent Lott's comments during Strom Thurmond's 100th birthday party (with the initial backlash coming from numerous bloggers), and Dan Rather's story about President Bush's National Guard service (which was eventually discredited by several bloggers).<sup>148</sup> Each of these stories have had a profound impact on the national level, yet they would never have developed in quite the way they did without the efforts of online journalists to investigate the truth and share the information they discovered with others on the World Wide Web.

These stories “broke” because of several unique qualities of the Internet. First, the Internet allows for any person to do his or her own investigation of a story simply with the click of a mouse.<sup>149</sup> This research is virtually unlimited. Second, the Internet connects people

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146. GILLMOR, *supra* note 7, at xvii.

147. See Joseph S. Alonzo, *Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 751, 772 (2006) (discussing the role of blogs in major news events).

148. *Id.* at 772–73.

149. Internet research is greatly facilitated by search engines on the World Wide Web, such as [www.google.com](http://www.google.com) and [www.yahoo.com](http://www.yahoo.com). These search engines are quite user-friendly and let a researcher find a wide variety of websites and articles from around the world that are related to a particular topic. Internet research is also facilitated by the increased access to databases, publications, and books that have been posted online by universities, libraries, research facilities, and other entities who want to contribute to the free flow of information.

from all across the United States (and around the world), and someone with extremely relevant information can communicate it to others who need to know about it through various methods of online communication. The information-sharing following the terrorist attacks of September 11, 2001, serves as one of many compelling examples of the value of online connection. In the hours and days following the attacks, Americans received reports from “emails, mailing lists, chat groups, [and] personal web journals—all nonstandard news sources.”<sup>150</sup> These online communication tools provided “valuable context” that was largely absent from the national media.<sup>151</sup> Lastly, the Internet gives people a chance to get feedback on the information they already have and believe is relevant through comments on blog postings or e-mail messages. This type of input on major stories can open up new insights on a topic and provide new sources of information to check—and recheck—the validity of the newsworthy story and all of its intricate details. Often, “[t]he people at the edges of the communications and social networks can be a newsmaker’s harshest, most effective critics. But they can also be the most fervent and valuable allies, offering ideas to each other and to the newsmaker as well.”<sup>152</sup>

Because of the track record of these Internet-only publications and the value that they have provided so far, it is likely that they will continue to play an important role in major news stories. It is therefore important that they receive recognition for their journalistic endeavors and ultimately receive reporter’s privilege protection.

## 2. Internet Publications and the Marketplace of Ideas

Internet-only publications improve the public discourse and access to the marketplace of ideas.<sup>153</sup> “[B]logging [is] a desirable social practice because it allows for wide dissemination of information relatively cheaply and quickly, it often invites comment and interaction, and it allows anyone with access to the [I]nternet to become part of the press.”<sup>154</sup> This online marketplace seems to be much closer to the one that the Founding Fathers envisioned when they first granted freedom of the press. An online marketplace of ideas in the Internet is much more accessible to the public than traditional media organizations. It grants

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150. GILLMOR, *supra* note 7, at x.

151. *Id.*

152. *Id.* at xiv.

153. Alonzo, *supra* note 147, at 773.

154. Frazee, *supra* note 87, at 634.

anyone and everyone the ability to post their opinions and insights about a wide range of topics, whether by creating their own posts or by simply commenting on other people's posts and articles.

The Internet has transformed journalism "from a 20th century mass-media structure to something profoundly more grassroots and democratic."<sup>155</sup> As a result, it encourages substantial discussion of ideas that affect different groups of people. Because of this accessibility and the evident role it plays in the distribution of ideas, the reporter's privilege should be extended to journalists and writers who use the Internet as their primary form of disseminating news and information.

*C. Difficulties with Extending Reporter's Privilege Protection to Internet Journalists*

A chief impediment to reporter's privilege legislation is uncertainty regarding the definition of a "journalist." The category can include all types of journalists in a variety of mediums, and often legitimate news that lawmakers originally intended to protect is not clearly distinguished from other types of news. The difficulties with the definition were brought up by the Bush administration as a reason for opposing any potential federal legislation for a reporter's shield. Due to concerns about protecting national security and ensuring that classified information was not leaked, the administration threatened to veto any shield law passed by Congress.<sup>156</sup> The U.S. Attorney General, Michael Mukasey, even emphasized during his confirmation hearings that a major sticking point the White House had with reporter's privilege legislation was "defining a journalist too broadly" to where it "might inadvertently protect . . . bloggers who are also spies or terrorists."<sup>157</sup>

As a result of fears about extending the reporter's privilege too far, little has been done to update the privilege with respect to modern technology and the developments that have taken place in the field of journalism. This problem must be resolved by granting Internet-only publications who act as valid and legitimate disseminators of news the protection of the reporter's privilege.

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155. GILLMOR, *supra* note 7, at xii.

156. Kellman, *supra* note 9, at 2.

157. *Id.*

*D. Application of the O'Grady Factors in a Two-Prong Test*

*O'Grady v. Superior Court* held that the Internet periodicals involved in the case could be considered "periodicals" under the California Constitution.<sup>158</sup> In the course of making its decision, the court considered many factors that helped distinguish between what should be considered an Internet "periodical" (and therefore eligible for reporter's privilege protection) and what should not be considered an Internet "periodical" (and therefore not eligible for reporter's privilege protection).<sup>159</sup> The court's test should become the basis upon which courts and legislatures alike, in the course of making a determination of who should receive reporter's privilege protection, define the online journalist.

This test is not without its caveats and should be carefully applied in each individual situation based upon the facts of the case. Under a proper analysis of all of the factors, the proper journalists will rightfully receive reporter's privilege protection. Likewise, under a proper analysis of all of the factors, parties lacking the inherent qualities of an Internet "periodical" will not receive reporter's privilege protection.

If any type of reporter's privilege protection will be afforded to an Internet journalist, it must be narrowly defined to counteract the fears of lawmakers and, at the same time, be drafted to allow those who truly deserve the protection to receive it. The framework established by *O'Grady* provides the basis for a solution to this problem.

In order to achieve a practical application of *O'Grady*, courts and legislatures should establish a two-prong test for their analysis. The first prong is an analysis of the Internet publication using the factors taken from *O'Grady*.<sup>160</sup> If an Internet publication satisfies a minimum of three of these factors, then it should be considered an Internet "periodical" that is eligible for reporter's privilege protection. If the publication does not satisfy any of the factors taken from *O'Grady*, or merely satisfies one of the four factors, then the publication would not receive reporter's privilege protection. However, if the publication satisfies two of the factors in the first prong of the test, then the second prong allows for a supplementary analysis of the Internet publication using two additional factors which were not considered in *O'Grady*. Both of these additional factors, a publication's reputation as an "established news source" and a

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158. *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 104–05 (Cal. Ct. App. 2006).

159. *Id.* at 99–105.

160. See *supra* text accompanying note 21.



publication's possession of its own URL, must be met to satisfy the second prong of the test. That is, under the second prong, if a publication satisfies two of the factors from *O'Grady* and both additional factors, then the publication should be considered an Internet "periodical" that is eligible for reporter's privilege protection. In essence, the second prong acts as a tie breaker if no clear consensus exists among the four factors in the first prong. Because the additional factors within the second prong are more subjective and do not provide a substantial assessment of whether the Internet publication is a credible news source, both factors in this final prong must be satisfied to receive protection.

### 1. The First Prong

The first prong is an analysis of the Internet publication using the factors taken from *O'Grady*. If an Internet publication strongly satisfies a minimum of three of these factors, then it should be considered an Internet "periodical" that is eligible for reporter's privilege protection. The factors are the common characteristics of both *O'Grady's* PowerPage and Apple Insider:<sup>161</sup> the frequency of publication,<sup>162</sup> the quantity of articles published per week,<sup>163</sup> a permanent web address,<sup>164</sup> and the number of visitors per month.<sup>165</sup> These characteristics are essential to making the determination of what truly constitutes an Internet periodical.

As with any legal test, it is difficult to find a scenario that fits all of the criteria perfectly. It is very possible that an Internet publication may not cleanly fit all of the criteria but should still qualify for the protection. This is why the first prong only requires a publication to satisfy three of the four factors found in *O'Grady*.

The following two examples are situations in which the online publication does not fit every single factor that describes a "periodical"

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161. *O'Grady*, 44 Cal. Rptr. 3d at 77.

162. "The frequency of publication" refers to how often an online publication posts something new on its website.

163. The "quantity of articles published per week" refers to how many new articles are posted per week. Although "frequency of publication" and "quantity of articles published per week" may seem synonymous, they are distinguishable because a website could easily publish once a week (which seems minimal) but post ten articles at that one instance of publication (which seems significant).

164. To determine whether or not the online publication's web address is "permanent," the analysis should parallel the analysis in *O'Grady*, in which the court considered how long the publication had been at its present address. See *O'Grady*, 44 Cal. Rptr. 3d at 77.

165. See discussion *supra* Part II.E (discussing *O'Grady*).

under the *O'Grady* interpretation. However, in each example the publication strongly satisfies three of the four factors. For this reason these Internet publications satisfy the first prong, and their authors would therefore receive reporter's privilege protection.

In the first example, a publication might not add new articles to its website very often but still meets all of the other relevant criteria under the *O'Grady* test. In this scenario, the writer of the Internet publication could make a strong case for reporter's privilege protection if he or she can establish that the publication receives frequent visits (also known as "hits") and has a permanent web address. Most importantly, the writer would need to show that he or she adds a significant amount of material to his or her website on the rare occasions that it is updated.

In the second example, a publication might not be frequently visited (does not get many "hits") but, similar to the first example, meets all of the other relevant criteria under the *O'Grady* test. In this scenario, under the interpretation of an online periodical provided from *O'Grady*, an Internet publication that is not frequently visited (does not get many "hits") may initially seem to fail to qualify for reporter's privilege protection due to its lack of popularity and difficulty in attracting a regular readership over time. However, the privilege should still be granted if the writer can show that the site has a permanent web address, that it frequently publishes articles, and that a significant amount of material is published per week.

## 2. The Second Prong

If a publication does not satisfy the first prong of the test because it only satisfied two of the four factors, then the second prong allows for a supplementary analysis of the Internet publication using two additional factors. The analysis under the second prong should be that, if a publication satisfies two of the factors from *O'Grady* and both additional factors, then the publication should be considered an Internet "periodical" that is eligible for reporter's privilege protection.

The additional factors that should be considered are a publication's reputation as an established news source and a publication's possession of its own URL. These factors carry less weight than those under the first prong. Therefore, if the test under the first prong is not met, both factors must be met under the second prong to qualify as a "periodical." These factors will supplement the analysis and provide insight into the precise services an online publication provides and contribute to the ultimate decision as to whether the publication is truly an Internet "periodical."

a. The "Established News Source" Factor

It can be difficult to define what makes a news source "established." The following criteria should be considered when making a determination about a publication's reputation as an established news source. These criteria, however, do not form an exhaustive list, so other criteria can be used to supplement the assessment of whether or not an Internet publication is an established news source. Ultimately, this factor will involve weighing all of the evidence and reviewing the Internet publication's overall reputation.

i. The Number of Hits

The number of hits received by a website is a good indicator of whether or not it is well-established. If a website receives a good amount of traffic, this likely indicates that it has a "following" that looks to it for news and information on a regular basis for one reason or another. However, the number of hits may be deceptive depending on the type of source and its readership. What may be considered well-established in a particular region based on the number of hits, for example, may not be considered well-established on a national level.

ii. Individuals Who Cite the Underlying Source

If another Internet journalist (or even a traditional journalist) considers an Internet publication reputable enough to make reference to it in his or her own writing, this lends credence to the argument that the underlying Internet publication is well-established. The argument becomes proportionally stronger based on the amount of attention that the second Internet publication (the one that cites the underlying Internet publication) garners on a regular basis. Many underlying Internet publications would receive protection this way, but the protection could easily be limited by a court or legislature to the precise story that was tied directly to the Internet publication.

iii. The Author of the Source

If the author of the source is someone who is putting his or her reputation, credentials, or profession on the line by providing the information contained in the Internet publication, the source can be viewed as "established" simply due to its authorship. Of course, Internet journalists are not required to have any established reputation,

credentials, or profession at all. Still, if what they are writing consistently lends itself to speaking about the authors' credibility, it is fair to say that the Internet publication is legitimate.

b. The "Publication's Possession of Its Own URL" Factor

If an Internet publication possesses its own URL, in contrast to the author of an online periodical simply hosting his or her website on a general blogging or posting service, the author likely has a desire to solidify his or her presence on the World Wide Web. This willingness to invest in a web address is indicative of a commitment to an online publication and is strongly persuasive in the argument for reporter's privilege protection. However, the length of time that an online author has owned his or her domain name should be a crucial part of the overall determination under this factor. If the author has not maintained a long-standing commitment to possessing his or her own URL, the online publication should not satisfy this test.

*E. Adoption of the "Periodical" Definition in Reporter's Privilege Legislation by the States*

Thirty-two states and the District of Columbia have adopted statutory protection of one kind or another for journalists involved in judicial proceedings.<sup>166</sup> Only three of the remaining eighteen states do not recognize a common law reporter's privilege.<sup>167</sup> Those states that already have a shield law should add the proposed two-prong test to their existing reporter's privilege statutes because of the increased prevalence of and credibility given to Internet journalists today. Those states that are still contemplating a shield law should address the issue of the Internet-only journalist as well. As one of the states considering reporter's privilege legislation, Kansas has the opportunity to adopt the two-prong test into a shield law similar to the one proposed in Senate Bill 313.<sup>168</sup> As a result, Kansas could lead the way in anticipating the ever-increasing likelihood that Internet journalists will claim the reporter's privilege.

The Kansas Legislature has wrestled with many difficult questions in considering reporter's privilege legislation. One primary concern of

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166. See *supra* note 56 (listing the states that have codified a shield law as of September 1, 2008).

167. Walker, *supra* note 43, at 1223.

168. S.B. 313, § 2, 2007 Sess. (Kan. 2007).

legislators has always been the failure of the bills that were introduced “to satisfactorily define who would qualify for these protections.”<sup>169</sup> After much discussion and controversy, earlier proposals limited the definition to “any person, company or other entity engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, [I]nternet, or radio or television broadcast.”<sup>170</sup> Still, this altered definition did not enhance previous bills sufficiently enough to result in their passage by the legislature. Therefore, Kansas currently is without a codification of the reporter’s privilege.

The definition from earlier proposals has not vanished completely, however. Instead it carried over into the most recent legislation, Senate Bill 313.<sup>171</sup> Still, it does not include the “periodical publication” that is part of the California Constitution and was so critical in *O’Grady*.<sup>172</sup> This standard could easily be included in future reporter’s privilege legislation as a two-prong test to provide a workable compromise that will ensure the protection of those Internet-only journalists who have come to make a difference in the public discourse and sharing of information, while at the same time limiting the extent of the protection to satisfy legislators who are concerned with giving free rein to anyone who uses the Internet. Moreover, it gives courts a relatively firm framework for granting such protection.

Because Kansas has recently debated reporter’s privilege legislation, it makes sense to address the issue of the Internet-only journalist in the context of this debate. After all, even though this issue has not yet been addressed by a great deal of case law, it will continue to arise as the world becomes more and more connected by the Internet. By adopting the criteria laid out in *O’Grady* as a two-prong test through a legislative proposal similar to Senate Bill 313, Kansas could lead the way in solving a difficult problem. Additionally, Kansas could address it quickly, effectively, and efficiently within the context of an ongoing debate about the rights of journalists.

#### IV. CONCLUSION

The reporter’s privilege is a necessary aspect of democracy in the United States because of the freedom and independence given to the press in the First Amendment of the United States Constitution. Even

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169. Walker, *supra* note 43, at 1233.

170. *Id.* at 1237 n.154.

171. See *supra* text accompanying note 76 (“acting as a journalist” definition).

172. *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 96 (Cal. Ct. App. 2006).

though the Supreme Court did not clearly support a reporter's privilege with its decision in *Branzburg v. Hayes*,<sup>173</sup> many states and many federal circuits have recognized at least a qualified reporter's privilege as a result of Justice Powell's concurring opinion and Justice Stewart's dissenting opinion.<sup>174</sup> Additionally, thirty-three jurisdictions have considered this issue important enough to pass legislation granting at least some form of protection to its journalists.<sup>175</sup>

With the emergence of Internet-only journalism and the recent decision in *O'Grady* to extend reporter's privilege protection to the publishers of online publications,<sup>176</sup> federal and state legislatures need to adopt a two-prong test to apply the "periodical" interpretation from *O'Grady* that offers protection to qualifying Internet journalists. This interpretation presents the best compromise for protection of Internet-only journalists without offering protection to every blogger. By protecting the fastest-growing area of journalism—while still limiting that protection—courts and legislatures will be extending journalistic rights to those who deservedly should receive them. At the same time, they will dispel one of the major fears cited by present-day opponents to reporter's privilege legislation—the fear that the protection will be too broad and will grant rights to everyone who publishes or posts material on the Internet.

Kansas is among the states that could treat *O'Grady*'s interpretation of a periodical as a model for codifying a reasonable and workable two-prong test for journalists who serve the public through a variety of media, including the Internet. Adding the two-prong test now would be a timely response to the growing likelihood that Internet journalists will seek the protective shield of the reporter's privilege.

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173. 408 U.S. 665 (1972).

174. See *supra* Part II.B.1.

175. See *supra* note 56.

176. *O'Grady*, 44 Cal. Rptr. 3d at 105.